

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DESERT VALLEY PAINTING & DRYWALL,
 INC.,

Plaintiff & Counterclaim Defendant,

vs.

UNITED STATES OF AMERICA,

Defendant & Counterclaim Plaintiff.

Case No. 2:10-cv-00490-KJD-GWF

ORDER

This matter is before the Court on Plaintiff/Counterdefendant Desert Valley Painting and Drywall, Inc.'s (hereinafter "Desert Valley") Motion for Clarification and Motion to Compel (#50), filed on June 1, 2012. Defendant/Counterclaimant United States (hereinafter "the Government") filed its Opposition to Plaintiff's Motion for Clarification and Motion to Compel (#52) on June 18, 2012. On June 29, 2012, the parties filed a stipulation to extend the time for Plaintiff to file its reply while the parties attempted to resolve at least some of the issues raised in the motion to compel. On August 15, 2012, Desert Valley filed its Notice of Withdrawn Issues Regarding Motion for Clarification and Motion to Compel (#56). Desert Valley thereafter filed its Reply to Opposition to Motion for Clarification and Motion to Compel (#57) on August 28, 2012. The Court conducted a hearing in this matter on September 7, 2012.

BACKGROUND

The issue in this case is whether drywall workers who performed work on behalf of Desert Valley from 2003 to 2006 were its employees or independent contractors. The Government contends that the drywall workers were Desert Valley's employees and that it was therefore required to withhold employee taxes from their pay. Desert Valley contends that it contracted with Centennial Drywall Systems, Inc. ("Centennial") to provide drywall workers for construction

1 projects in Southern Nevada. Desert Valley alleges that Centennial represented that the IRS
2 approved its treatment of the workers as independent contractors pursuant to a 1989 worker
3 classification letter it received from the IRS. Desert Valley alleges that it relied on Centennial's
4 representations regarding the IRS's approval of the worker's independent contractor classification
5 and that it was the industry standard in Southern Nevada to treat drywall workers as independent
6 contractors. Desert Valley alleges that beginning in 2007 the IRS began efforts to reclassify the
7 drywall workers as employees rather than independent contractors. The IRS first attempted to
8 collect employment taxes from Centennial and when that effort was unsuccessful, pursued efforts
9 to collect employee taxes from Desert Valley and other drywall contractors who used Centennial's
10 services.

11 The Government filed a motion for protective order in September 2011 in regard to Desert
12 Valley's Fed.R.Civ.Pro. 26(a)(1) witness disclosures which indicated that Desert Valley intended to
13 elicit testimony from IRS employees regarding their analysis, impressions and conclusions during
14 the administrative process relating to Desert Valley's alleged tax liability. The Government also
15 sought a protective order regarding Desert Valley's requests for production of documents to the
16 extent they seek such information. The Government argued that the factual and legal analysis
17 employed by the IRS during the administrative process is irrelevant because the district court is
18 required to make an independent or *de novo* determination of Desert Valley's alleged tax liability.

19 This Court agreed with the Government's argument and granted the protective order. *See*
20 *Order (#41), filed November 3, 2011*. The Court, however, limited the scope of the protective
21 order with respect to the defense raised by Desert Valley pursuant to Section 530(a)(2) of the
22 Revenue Act of 1978. That statute provides that a taxpayer has a reasonable basis for not treating
23 an individual as an employee if the treatment was based in reasonable reliance on (A) judicial
24 precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the
25 taxpayer; (B) a past IRS audit of the taxpayer in which there was no assessment attributable to the
26 treatment of individuals holding substantially similar positions to that held by the subject
27 individual(s); or (C) long-standing recognized practice of a significant segment of the industry in
28 which such individual was engaged. In addition to these listed circumstances, a taxpayer may

1 demonstrate any other reasonable basis for not treating an individual as an employee for tax
2 purposes. *Order (#41)*, pgs. 7-8. Because Desert Valley's defense is based on representations
3 allegedly made to Centennial by the IRS, and by Centennial to Desert Valley and other drywall
4 contractors, the Court held that Desert Valley was entitled to conduct discovery regarding
5 communications between the IRS and Centennial, as well as IRS audits of Centennial which
6 allegedly did not result in a conclusion that the drywall workers were employees of Centennial.
7 *Id.*, pgs. 9-11. The Court held, however, that internal memoranda containing the IRS's analysis,
8 recommendations or conclusions regarding the employment status of the drywall workers are
9 irrelevant if the memoranda or their contents were not disclosed to Centennial or Desert Valley.
10 *Id.*, pg. 11.

11 After the protective order was granted, the Government supplemented its discovery
12 responses. In its Motion for Clarification and Motion to Compel (#50), Desert Valley argues that
13 the Government may be improperly withholding relevant documents and information based on an
14 overly broad interpretation of the protective order. Desert Valley argues that it is unable to make
15 this determination, however, because the Government has not provided any affidavits or "privilege"
16 logs which adequately describe the information or documents that have been withheld based on
17 lack of relevancy. Desert Valley therefore seeks to compel the Government to further supplement
18 its discovery responses or to provide more specific descriptions of the information and documents
19 that have been withheld.

20 DISCUSSION

21 Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a party may obtain
22 discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. For
23 good cause, the court may broaden the scope of discovery to any matter relevant to the subject
24 matter involved in the action. Relevant information need not be admissible at trial if the discovery
25 appears reasonably calculated to lead to the discovery of admissible evidence. Relevancy under
26 Rule 26(b)(1) is liberally or broadly construed. *U.S. E.E.O.C. v. Caesars Entertainment, Inc.*, 237
27 F.R.D. 428, 431-32 (D.Nev. 2006). The party opposing discovery has the burden of showing that
28 the discovery is overly broad, unduly burdensome or not relevant. *Graham v. Casey's General*

1 *Stores*, 206 F.R.D. 251, 253-4 (S.D. Ind. 2000). To meet this burden, the objecting party must
 2 specifically detail the reasons why each request is irrelevant. *Id.*, citing *Schaap v. Executive Indus.,*
 3 *Inc.*, 130 F.R.D. 384, 387 (N.D. Ill. 1990) and *Walker v. Lakewood Condominium Owners Assoc.*,
 4 186 F.R.D. 584, 587 (C.D. Cal.1999). “However, when a request for discovery is overly broad on
 5 its face or when relevancy is not readily apparent, the party seeking the discovery has the burden to
 6 show the relevancy of the request.” *Marook v. State Farm Mutual Auto. Ins. Co.*, 259 F.R.D. 388,
 7 394-95 (N.D. Iowa 2009), quoting *Cunningham v. Standard Fire Ins. Co.*, 2008 WL 2902621 at *1
 8 (D. Colo.).

9 **1. REQUESTS FOR PRODUCTION**

10 **A. Request for Production Nos. 3, 8, 9, 10, 11, 12, 15, 16 and 18.**

11 Several of Desert Valley’s requests for production are quite general in their description of
 12 the requested documents. Request No. 3 requests “all documents prepared by you prior to the
 13 commencement of this action which refer, reflect or relate to any facts which support your defense
 14 against Plaintiff’s claim and/or your counterclaim in this action.” Request No. 8 requests “all
 15 documents that support your defense that ‘Plaintiff’s workers . . . were properly classified by the
 16 IRS as Plaintiff’s employees.’” Request No. 9 requests “all documents that support your defense
 17 that ‘Plaintiff is not entitled to a refund in this matter as Plaintiff does not qualify for relief under
 18 Section 530(a) of the Revenue Act of 1978.’” Request No. 10 requests “all documents on which
 19 you rely to defend against Plaintiff’s claims and/or support your counterclaim, that have not been
 20 produced in your responses to the preceding requests.” These requests call for the Government to
 21 broadly determine which documents are relevant to its defenses or counterclaim. They also overlap
 22 more limited requests such as Request No. 15 which seeks all documents regarding
 23 communications made by Desert Valley which the Government contends are admissions of the
 24 Plaintiff and Request No. 16 which seeks all documents regarding communications made by
 25 Centennial which support the Government’s contention that the workers Centennial provided to
 26 Desert Valley were employees of Desert Valley.

27 Although the Government objected to these requests on various grounds, including the work
 28 product doctrine, it stated that it had already disclosed witnesses and documents it may use to

1 support its defenses and counterclaim and that it would produce additional relevant and non-
2 privilege documents in accordance with the protective order. The Government states that following
3 the issuance of the protective order in November 2011, it produced an additional 4,000 pages of
4 documents. *Opposition* (#52), pg. 5. The Government further states that it has withheld fewer than
5 70 irrelevant pages produced by the IRS in connection with its audit of Plaintiff, while producing
6 over 2,100 relevant pages; and that with respect to documents connected to the audit of Centennial,
7 it withheld roughly 8,300 pages of documents as irrelevant, while producing nearly 4,000 relevant
8 pages. *Id.*, pg. 6. The Government states that of the withheld material, approximately 6,000 pages
9 are account transcripts showing Forms 1099 (Miscellaneous Income that relate to years that are not
10 at issue in this case). Almost 1,700 additional pages represent duplicates of account transcripts that
11 have already been produced. The Government states that the remaining 600 pages largely fall into
12 five major categories, ranging in size from roughly 60-150 pages, listed from most to least
13 voluminous: (1) internal IRS transcripts and documents containing the IRS' analysis, mental
14 impressions, and theories; (2) duplicates of Centennial promotional materials already within
15 Plaintiff's possession, custody or control; (3) documents concerning certain third party (non-
16 Plaintiff) drywall companies that contracted with Centennial; (4) records of IRS investigations of
17 Centennial that were not focused on employment tax adjustments; and (5) materials related to the
18 Nevada Contractor's Board's investigation of Centennial. *Id.*, pg. 6.

19 Desert Valley does not expressly take issue with the Government's assertion that the
20 documents described in categories (2)-(5) are irrelevant, although its does not concede the point
21 either. Desert Valley's chief concern appears to be that the Government may be improperly
22 withholding documents or parts of documents on the grounds that they are protected from
23 disclosure by the protective order without providing adequate descriptions of the withheld
24 information so that Desert Valley can make informed decisions whether to challenge the
25 Government's assertions. Desert Valley notes in this regard that the Government has redacted at
26 least 310 pages of documents in whole or in part without providing adequate information about the
27 nature of the redactions. *Reply* (#57), pg. 7.

28 ...

1 As a general matter, a party responding to discovery is not required to provide a specific
2 description or log of the documents in its possession, custody or control that it asserts are irrelevant
3 or not responsive to the discovery requests. When a governmental agency asserts that otherwise
4 relevant documents are protected from disclosure by the deliberative process privilege, however, it
5 is required to provide a particularized explanation of why each document falls within the privilege.
6 This submission is referred to as either a privilege log or *Vaughn* index. *Nevada v. U.S. Dept. of*
7 *Energy*, 517 F.Supp.2d 1245, 1254 (D. Nev. 2007). The index requirement serves to allow the
8 requesting party to contest the contention that the document falls under the privilege and prevents
9 burdensome and non-adversarial *in camera* review of *ex parte* submissions from becoming the
10 norm. *Id.* citing *Wiener v. F.B.I.*, 943 F.2d 972, 977 (9th Cir. 1991).

11 The protective order in this case was based on the Government's assertion that the IRS's
12 administrative analysis, impressions and conclusions regarding the employment status of the
13 drywall workers are irrelevant.¹ It was not based on an assertion of the deliberative process
14 privilege. The Government asserts in its opposition to Desert Valley's motion for clarification and
15 motion to compel, however, that the protective order overlaps with the deliberative process
16 privilege which covers documents "reflecting advisory opinions, recommendations and
17 deliberations comprising part of the process by which government decisions and policies are
18 formulated." *Opposition* (#52), pgs. 7-8, citing *Department of Interior v. Klamath Water Users*
19 *Protective Ass'n*, 532 U.S. 1, 8 (2001), citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150
20 (1975). Thus, "any information that would otherwise be protected from disclosure by the
21 deliberative process privilege is irrelevant under the protective order." *Id.*²

22
23 ¹ These matters are irrelevant because the IRS's analysis and conclusions are not,
24 themselves, at issue in this case. The facts underlying the IRS's analysis and conclusions are at
25 issue, however, and are therefore relevant.

26 ² The deliberative process privilege is formally invoked by the head of agency after he or she
27 has personally considered the material in question and has submitted a declaration stating the
28 precise reasons for reserving the confidentiality of the information and identifying and describing
the documents to which the privilege is asserted. *EEOC v. Hotspur Resorts*, 2012 WL 2415541, *2
(D.Nev. 2012), citing *EEOC v. Peoplemark, Inc.*, 2010 WL 748250, *3 (W.D.Mich. 2010). *See*

1 The Court generally agrees with the Government’s assertion. The question arises, however,
2 as it does under the deliberative process privilege, whether relevant factual information contained
3 in the IRS’s administrative documents can be segregated from the evaluative or deliberative
4 content, and produced to Desert Valley. In *EPA v. Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 837-
5 838 (1973), the Supreme Court stated that memoranda consisting only of compiled factual material,
6 or purely factual material contained in a deliberative memoranda and severable from its context, is
7 generally discoverable. *Mink* directed lower courts to apply a flexible, common sense approach in
8 determining whether the factual information can be segregated from the evaluative or deliberative
9 content. *Id.* 410 U.S. at 91, 93 S.Ct. at 838.

10 In *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th
11 Cir. 1988), the Ninth Circuit stated that “[i]n some circumstances, even material that could be
12 characterized as ‘factual’ would so expose the deliberative process that it must be covered by the
13 [deliberative process] privilege.” (internal citation omitted). The court adopted a
14 “process-oriented” or “functional” test under which factual materials will be exempt from
15 disclosure to the extent that they reveal the mental processes of decisionmakers. “In other words,
16 whenever the unveiling of factual materials would be tantamount to the ‘publication of the
17 evaluation and analysis of the multitudinous facts’ conducted by the agency, the deliberative
18 process privilege applies.” *Id.* (internal quotations marks and citations omitted).

19 This functional test should not be carried too far, however. In *Playboy Enterprises v. Dept.*
20 *of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982), the court rejected the argument that because a
21 report reflects the author’s “choice, weighing and analysis of facts,” the factual content of the report
22 is also protected as a part of the deliberative process. The court stated that “[a]nyone making a
23 report must of necessity select the facts to be mentioned in it; but a report does not become a part of
24

25 also *Islamic Shura Council of Southern California v. F.B.I.*, 635 F.3d 1160, 1166 (9th Cir. 2011).
26 In this case, the Government has not complied with the formal requirements for invoking the
27 deliberative process privilege. However, compliance with these formalities is not required in
28 regard to the Government’s alternative objection based on lack of relevance.

1 the deliberative process merely because it contains only those facts which the person making the
2 report thinks material. If this were not so, every factual report would be protected as a part of the
3 deliberative process.” *Id.*

4 Desert Valley attached to its motion copies of documents produced by the Government that
5 have been substantially redacted. *Motion (#50), Exhibit 13*. The Government also produced a
6 privilege log in support of its assertion that the deliberative process privilege applies to the redacted
7 documents. *Id., Exhibit 12*. The privilege log identifies the title or nature of the document, its
8 author, its date (if known), and states that it is withheld based on the deliberative process privilege.
9 Although the titles of some of the documents indicate that they are analytical or deliberative type
10 memoranda, e.g. “IRS Memorandum: Appeals Summary and Recommendation,” the Court agreed
11 with Desert Valley that the privilege log, alone, does not provide sufficient information to
12 determine whether the redacted portions have been properly withheld. The Court therefore ordered
13 that the unredacted documents in Exhibit 13 be provided to the Court for *in camera* review.
14 Having reviewed the documents, the Court finds that there is relevant factual information in the
15 redacted documents that can be produced to Desert Valley without disclosing the IRS employees’
16 analysis, impressions and conclusions. The Court will return to the Government’s counsel a copy
17 of the documents submitted for *in camera* review which identifies those portions of the redacted
18 documents that should be produced to Desert Valley.

19 Desert Valley also attached to its reply brief additional redacted documents produced by the
20 Government. *Reply (#57), Exhibit 2*. Desert Valley also states that the Government has produced
21 at least 310 pages of documents which have been redacted. The Government has apparently not
22 provided a “privilege” log for the redactions in these documents. Based on the Court’s finding that
23 the documents submitted for *in camera* review contain factual information that can be disclosed
24 without revealing the mental processes of the IRS decisionmakers, it is possible that the
25 Government has also withheld, in whole or in part, other documents that contain relevant factual
26 information that could be disclosed without revealing the IRS employees’ analysis, impressions and
27 conclusions. The Court does not intend, however, to undertake *in camera* review of other withheld
28 or redacted documents. Instead, the Government is ordered to reconsider documents it has

1 withheld or redacted based on the protective order in this case. The Government should produce
 2 those documents or parts of documents, previously withheld, that contain relevant factual
 3 information which can be disclosed without revealing the IRS's administrative analysis,
 4 impressions and conclusions. The Government should also provide a "privilege" log or index
 5 which adequately explains the grounds for withholding the document or a portion therefore based
 6 on the protective order. The log or index shall include a certification that the withheld document or
 7 portion thereof does not contain relevant factual information, or that the relevant factual
 8 information cannot be segregated and produced without disclosing the IRS employees' analysis,
 9 impressions and conclusions.

10 The foregoing discussion appears to resolve the issues relating to Desert Valley's Request
 11 for Production of Documents Nos. 3, 8, 9, 10, 11, 12, 15, 16 and 18.

12 **B. Request for Production No. 6.**

13 Request for Production No. 6 requests all documents that support the Government's denial
 14 of the allegation in paragraph 11 of the complaint that "the Internal Revenue Service attempted to
 15 collect payroll taxes from CDSI [Centennial] but was unsuccessful." The Government responded
 16 to this request by referring to its response to Interrogatory No. 7 in which it stated that it did not
 17 deny the allegations in paragraph 11 of the complaint, but rather stated that it lacked knowledge or
 18 information sufficient to form a belief as to the truth of those allegations. The interrogatory
 19 answer, thus, indicates that the Government does not know whether the IRS attempted to collect
 20 payroll taxes from CDSI, but was unsuccessful.

21 A party is generally charged with knowledge of what its agents know, or what is in records
 22 available to it, or even information others have given to it on which it intends to rely in the action.
 23 A party cannot limit its discovery responses to matters within its own knowledge and ignore
 24 information immediately available to it or under its control. *FDIC v. Halpern*, 271 F.R.D. 191, 193
 25 (D.Nev. 2010), citing 8B Wright, Miller, Kane & Marcus, *Federal Practice and Procedure* § 2177
 26 (3rd Ed. 2010). The Government has a duty to make reasonable inquiry into the information or
 27 documents in its possession, custody and control that will permit it to answer Interrogatory No. 7
 28 and produce documents responsive to Request No. 6. If after reasonable inquiry, the Government

1 is still unable to answer the interrogatory or produce documents, then it may properly so state. The
2 Court therefore directs the Government to supplement its response to Request No. 6 and/or
3 Interrogatory No. 7 in a manner consistent with this order.

4 **C. Requests for Production Nos. 19-23.**

5 Request for Production No. 19 requests all advice memoranda, including but not limited to
6 Background Advice Memoranda, Chief Counsel Advice, Field Service Advice, National Office
7 Advice Memoranda, Litigation Guideline Memoranda, Private Letter Rulings, Technical Advice
8 Memoranda and Written Determinations, issued by the IRS that the Government contends are
9 relevant in interpreting the proper tax treatment of the issues that arose in the audits of Plaintiff's
10 employment tax returns. The Government objected to this request on the grounds that it seeks to
11 inquire into attorney work product and the thought process of counsel for the United States. In its
12 opposition to Desert Valley's motion, the Government further states that "none of the requested
13 categories of documents are relevant to the proper tax treatment in this de novo proceeding, and,
14 therefore, there are no documents that are responsive to the request. *Opposition* (#52), pg. 8, n. 7.
15 Based on the Government's representation that it does not contend that any of the requested
16 documents are relevant in interpreting the proper tax treatment of the issues that arose in the audits
17 of Plaintiff's employment tax returns, Desert Valley's motion to compel responses to Request No.
18 19 is denied.

19 Request No. 20 requests all Announcements, Cumulative Bulletins, Disclosure Litigation
20 Bulletins, Internal Revenue Bulletins, IRS Publications, News Releases, Notices, Revenue
21 Procedures, Pamphlets and/or Handbooks, issued from 1991 to the present which in any way relate
22 to the topics at issue in the audit of Plaintiff's 2004, 2005 and 2006 employment tax returns.
23 Request No. 21 requests all Non-Docketed Significant Advice Review and/or Action on Decision
24 issued and/or released from 1991 to the present which in any way relate to the topics at issue in the
25 audit of Plaintiff's 2004, 2005 and 2006 employment tax returns. Request No. 22 requests all
26 Appeals Technical Guidance or other issue papers released pursuant to the Appeal Industry
27 Specialization Program or Appeals Coordinated Issue Program which in any way relate to the
28 topics at issue in the audit of Plaintiff's 2004, 2005 and 2006 employment tax returns. Request No.

1 23 requests all Attorney General Opinions, Briefing Memorandum, Controller General Opinions,
2 General Counsel Memoranda, Legal Memoranda, Revenue Rulings, Technical Memoranda, and/or
3 Treasury Decisions issued and/or released by the Government from 1991 to the present which in
4 any way relate to the topics at issue in the audit of Plaintiff's 2004, 2005 and 2006 employment tax
5 returns.

6 The Government objected to Request Nos. 20-23 on the grounds that they are overbroad
7 and unduly burdensome, are not calculated to lead to the discovery of admissible evidence, and also
8 seek to inquire into the attorney work product and thought process of counsel for the Government.
9 Desert Valley argues that the foregoing requests are relevant to determining the IRS's guidelines
10 for classifying workers and/or the applicability of Section 530 relief for use in either the
11 presentation of Plaintiff's case or defenses as well as to challenge the validity and viability of the
12 Government's claims. *Reply* (#57), pg. 22. In its opposition, the Government argues, however,
13 that the requests are overbroad in that they "appear to request every pronouncement the IRS has
14 made in over two decades in relation to employment tax issues." *Opposition* (#52), pg. 8, n. 8. The
15 Government further states that a search for "employment tax" in Westlaw's IRS Administrative
16 Materials (FTX-RELS) database returns 4,894 unique responsive documents. The Government
17 states that the records sought by Desert Valley are publicly available and the Government should
18 not be burdened with producing the documents and, in effect, performing legal research for
19 Plaintiff's counsel. *Id.* Desert Valley argues, however, that "such a search is prohibitively costly
20 for Plaintiff who would incur database access charges *on either a per document basis or a costly*
21 *per hour charge* because it is not a database its counsel's office subscribes to." *Reply* (#57), pg. 23.
22 Additionally, Desert Valley argues that not all of the documents are available on Westlaw. Desert
23 Valley argues, however, that the Government has access to all these documents in its electronic
24 databases and that they can be identified through a simple word search. *Id.*

25 Desert Valley's assertion that the requests are relevant to its claim that it is entitled to relief
26 under §530(a) of the Revenue Act of 1978 is questionable. Section 530(a)(2) provides that a
27 taxpayer has a reasonable basis for not treating an individual as an employee if the taxpayer's
28 treatment of such individual "was *in reasonable reliance on* ... (A) judicial precedent, published

1 rulings, technical advice with respect to the taxpayer or a letter ruling to the taxpayer.” (Emphasis
2 added). The reliance element in the statute obviously contemplates that the taxpayer was aware of
3 the judicial precedent, published rulings, or technical advice, *et cetera*, at the time it made the
4 decision to not treat the individual as an employee. Absent information that Desert Valley seeks
5 production of IRS documents that Desert Valley actually relied on in making its decision regarding
6 the employment status of the drywall workers, Request Nos. 19-23 are not relevant to Desert
7 Valley’s assertion that it is entitled to relief under §530(a)(2).

8 In *Acord v. Unites States*, 92 F.R.D. 355 (E.D.Mo. 1981), the plaintiff taxpayer requested
9 all memoranda, letters, documents or reports in the government’s possession relating to numerous
10 revenue rulings, and any letter rulings and associated documents in which the IRS had approved or
11 denied a plan proposed to qualify under Section 403(b) of the Internal Revenue Code in
12 circumstances allegedly similar to those at issue. The court held that the requested documents were
13 irrelevant because they had no bearing on plaintiffs’ action for a tax refund. The court relied on
14 *International Business Machines Corp. v. United States*, 343 F.2d 914, 919 (Ct.Cl. 1965), cert.
15 denied, 382 U.S. 1028, 86 S.Ct. 647, 15 L.Ed.2d 540 (1966) in which the court stated that
16 “taxpayers can never avoid liability for a ... tax by showing that others have been treated
17 generously, leniently or erroneously by the Internal Revenue Service-each individual must rest ...
18 on the validity of his own position, under the applicable taxing provision independently of others.”
19 The court in *Tupper v. United States*, 1995 WL 230551, *3 (D.Mass. 1995) also held that similar
20 document requests in a tax refund case were irrelevant.

21 The Government also argues that Request Nos. 20-23 seek to make the Government do
22 Plaintiff’s legal research. In support of this argument, the Government relies on *Lewis v. Chicago*
23 *Housing Authority*, 1991 WL 222167, (N.D.Ill. 1991) in which the plaintiff requested any
24 documents that the defendant intended to rely on in support of its contention that lost wages were
25 not available to plaintiff as a matter of law. The court denied this request because it asked for the
26 production of defendant’s work product and the disclosure of the mental impressions, conclusions,
27 opinions and legal theories of defendant’s counsel. The court stated that “[p]laintiff’s attorneys can
28 do their own research on the law of damages and argue their own conclusions before this court.

1 We will not order defendant to do plaintiff's legal research." *Id.* at *4.

2 In *United States v. The Northern Trust Co.*, 210 F.Supp.2d 955 (N.D.Ill. 2001), the
3 government sought to recover a tax refund to which the defendant allegedly was not entitled. The
4 defendant sought production of certain IRS rules, procedures, guidelines and instructions which the
5 government asserted amounted to a request to turn over its legal research. In ruling on this
6 objection, the Court stated:

7 Concededly, the language is broadly phrased and would appear to
8 include many publicly available documents. Defendants must do
9 their own research to find the relevant legal authorities. Many
10 informal opinions, internal policies and procedures, however, are not
publicly available. Those that are prepared in the ordinary course of
the IRS' operations, not in preparation of litigation, are not work
product. (citations omitted). These are discoverable.

11 *Id.* 210 F.Supp. 2d at 958.

12 See also *National Advance Systems v. United States*, 16 C.I.T. 659, 795 F.Supp. 1208
13 (C.I.T. 1992) (holding that information contained in judicial rulings and findings, textbooks,
14 treatises, and dictionaries could be obtained by the plaintiff without undue hardship and the court
15 would not order defendant to do plaintiff's research).

16 Request Nos. 20-23 seek a wide range of IRS or United States Government publications or
17 other documents without any clear demonstration of how they are relevant to the issues in this
18 action. Compliance with the requests would require the Government to assemble, copy and
19 produce thousands of documents, many of which the Government asserts are publicly available.
20 Although Desert Valley's counsel states that it would be unduly expensive for Desert Valley to
21 obtain the documents through Westlaw, this expense appears to be due in large part to the over
22 breadth of the requests. Desert Valley also states that some of the requested documents may not be
23 publicly available through Westlaw or otherwise, but it does not identify which of the requested
24 documents can only be obtained from the Government, or why those documents are relevant to the
25 claims and defenses in this case. Accordingly, Desert Valley's motion to compel responses to
26 Request Nos. 20-23 is denied.

27 ...

28 ...

1 **2. INTERROGATORIES**

2 **A. Interrogatory No. 3.**

3 Interrogatory No. 3 asks the Government to “identify all persons interviewed, or otherwise
4 communicated with by anyone on your behalf with regard to the subject matter of this action prior
5 to the date on which the plaintiff filed this action and (a) [s]tate the substance of such
6 communication, and (b) identify any documents that memorialize such communications.” The
7 Government objected to this interrogatory on the grounds that it is compound and overbroad.
8 Subject to that objection, the Government stated that “responsive communications regarding
9 Plaintiff’s employment tax liabilities are summarized in the following nonprivileged documents:”
10 The Government then lists the bates numbers of documents. The Government ends its response to
11 the interrogatory by stating: “The identities of individuals involved in each correspondence, as well
12 as the substance of each correspondence, can be found therein.”

13 It is not clear from the parties’ briefs what is actually in dispute in regard to the
14 Government’s response to Interrogatory No. 3. The Government’s response does not list the names
15 of individuals who were interviewed by it in connection with the subject matter of the action. The
16 Government, however, identified documents which it states contain the identity of the individuals
17 involved “in each correspondence” and the substance of the “correspondence.” Desert Valley’s
18 motion and reply briefs are unclear as to whether Government’s representations regarding the
19 documents referenced in its response to the interrogatory are accurate. Desert Valley is entitled to a
20 responsive answer to Interrogatory No. 3. The parties are directed to further meet and confer on
21 this interrogatory and see if they can resolve the dispute—whatever it is. If they cannot resolve the
22 issue, then they may submit follow-up written status reports that clarify for the Court what is in
23 dispute regarding the Government’s response to this interrogatory.

24 **B. Interrogatory Nos. 11, 12, 13 & 14.**

25 Interrogatory 11 asks the Government to identify all of its employees, agents, or
26 representatives who participated in the audit of Centennial’s 1988 and 1989 employment tax
27 returns or who had input into the worker classification determination resulting from that audit.
28 Interrogatory No. 12 asks the Government to identify all of its employees, agents, or representatives

1 who participated in the audit of Centennial's Form 1120 tax return for tax year ending October 31,
2 1990 or who had input into the worker classification determination resulting from that audit.
3 Interrogatory No. 13 asks the Government to identify all of its employees, agents, or representatives
4 who participated in the 1994 worker status determination regarding Centennial worker William D.
5 Knowles, and/or had input in the resulting worker classification determination. Interrogatory No.
6 14 asks the Government to identify all of its employees, agents, or representatives who participated
7 in the audit of Centennial's 2004 and 2005 employment tax returns, and/or had input into the work
8 classification determination resulting from that audit. The Government objected to these
9 interrogatories on the grounds that they are not reasonably calculated to lead to the discovery of
10 admissible evidence.

11 The identities of IRS employees, agents or representatives who may have knowledge of
12 facts relevant to the issues in this case, or who may have engaged in communications with
13 Centennial and/or Desert Valley regarding the employment status of the drywall workers, are
14 relevant and discoverable. The Government is, therefore, ordered to answer Interrogatory Nos. 11-
15 14 to this extent. Neither the Government nor its past or present employees, agents or
16 representatives, are required, however, to disclose their internal administrative analysis,
17 impressions and conclusions regarding the employment status of the drywall workers.

18 CONCLUSION

19 **IT IS HEREBY ORDERED** that Desert Valley's Motion for Clarification and Motion to
20 Compel (#50) is **granted**, in part, as follows:

21 Within fourteen (14) days of the filing of this order:

22 1. Defendant shall produce those redacted portions of the documents contained in
23 Exhibit 13 to Plaintiff's Motion (#50) that the Court has identified in its return of the unredacted
24 documents submitted for *in camera* review;

25 2. Defendant shall review other documents that it has withheld, in whole or in part,
26 based on the protective order, *Order* (#41), and shall produce those documents or parts of
27 documents, previously withheld, that contain relevant factual information which can be disclosed
28 without revealing the IRS's administrative analysis, impressions and conclusions. The Government

1 shall provide a "privilege" log or index which adequately explains the grounds for withholding
2 each document, or portions thereof, based on the protective order. The log or index shall include a
3 certification that the withheld document, or portion thereof, does not contain relevant factual
4 information, or that the relevant factual information cannot be segregated and produced without
5 disclosing the IRS employees' analysis, impressions and conclusions;


6 3. Defendant shall respond to Request No. 6 in accordance with this order;

7 4. Defendant shall answer Interrogatory Nos. 11, 12, 13 and 14 in accordance with this
8 order; and

9 5. The parties shall further meet and confer regarding Defendant's answer to
10 Interrogatory No. 3 and may submit follow-up status reports if they are unable to resolve the
11 dispute.

12 The remainder of Plaintiff's Motion for Clarification and Motion to Compel (#50) is
13 **denied.**

14 DATED this 5th day of October, 2012.

15
16 
17 GEORGE FOLEY, JR.
18 United States Magistrate Judge
19
20
21
22
23
24
25
26
27
28